From:

**Criminal Law and Procedure**

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What Is a Crime?

Every crime involves a wrongful act *(****actus reus****)* specifically prohibited by the crimi- nal law. For example, in the crime of battery, the *actus reus* is the striking or offen- sive touching of another person. Even the failure to take action can be considered a wrongful act if the law imposes a duty to take action in a certain situation. For ex- ample, a person who fails to file a federal income tax return may be guilty of a federal offense.

In most cases, the law requires that the wrongful act be accompanied by crimi- nal intent *(****mens rea****).* Criminal intent does not refer to a person’s motive or reason for acting but merely to having formed a mental purpose to act. To convict a per- son of a crime, it is not necessary to know why a person committed the crime. It is only necessary to show that the individual intentionally committed a prohibited act. An unintentional act is usually not a crime, although, as we will discover, there are exceptions to this principle. Moreover, in certain instances, one may be held criminally responsible irrespective of intent. Crimes of this latter nature are classi- fied as **strict liability offenses**. A good example of a strict liability offense is sell- ing liquor to a minor. (Strict liability offenses and general elements of crimes are discussed in Chapter 4.)

Felonies and Misdemeanors

Criminal law distinguishes between serious crimes, known as **felonies**, and less serious offenses, called **misdemeanors**. Generally speaking, felonies are offenses for which the offender can be imprisoned for more than one year; misdemeanors carry jail terms of less than one year. Common examples of felonies include murder, rape, robbery, burglary, aggravated assault, aggravated battery, and grand theft. Typical misdemeanors include petit theft, simple assault and battery, disorderly conduct, prostitution, and driving under the influence of alcohol.

Societal Interests Served by the Criminal Law

We can distinguish among types of crimes by the underlying societal interests that give rise to criminal prohibitions. Obviously, government has a duty to protect the lives and property of citizens—this is the essence of the social contract on which democratic government is based. Society also has an interest in protecting the public peace, order, and safety. Today, the protection of the national security from terrorism has become an important concern of the criminal law. Over the last several decades, the protection of the public health and the preservation of the natural environment have also come to be seen as interests that should be furthered by the criminal law. And, of course, society has an interest in efficient and honest public administration and, in particular, the administration of justice.

Table 1.1 lists the societal interests served by the criminal law and shows some particular crimes that relate to each interest. The table also indicates the chapters in this book that deal with the different types of crimes. Note that some of the crimes relate to more than one societal interest.

**TABLE 1.1** | An Overview of Types of Crimes and the Societal Interests Involved

Societal Interest Served Examples of Crimes Discussed in Chapter(s)

Protection of Persons against Violence

Protection of Property and

Economic Interests

Maintenance of Standards of Decency

Public Health and the

Natural Environment

Public Peace, Order, and

Safety

Assault and Battery, Rape and Sexual Battery, Murder, Manslaughter, Spousal and Child Abuse, Kidnapping, Stalking

Vandalism, Theft, Burglary, Arson, Robbery, Extortion, Forgery, Larceny, Embezzlement, Securities Fraud, Insider Trading, Mail Fraud

Prostitution, Obscenity, Bigamy, Indecent Exposure, Gambling, Alcohol and Drug Offenses

Fishing and Hunting Violations, Smoking Violations, Illegal Toxic Waste Disposal, Illegal Air Pollution

Disorderly Conduct, Incitement to Riot, Motor Vehicle Offenses, Loitering, Weapons Violations, Terrorism

Chapter 6, Homicidal Offenses; Chapter 7, Other Offenses against Persons

Chapter 8, Property Crimes; Chapter 9, White-Collar and Organized Crime

Chapter 10, Vice Crimes

Chapter 11, Offenses against Public

Health and the Environment

Chapter 12, Offenses against Public

Order, Safety, and Security

National Security Treason, Espionage, Sabotage, Sedition, Terrorism Chapter 12, Offenses against Public

Order, Safety, and Security

Honest and Efficient Administration of Government and the Justice System

Resisting Arrest, Bribery, Perjury, Obstruction of

Justice, Contempt, Escape

Chapter 13, Offenses against Justice and Public Administration

Criminal Law, Morality, and Justice

Traditionally, the preservation of public morality has been regarded as an important function of the criminal law. Today this assumption is often questioned by those who believe that morality, like religion, is a personal matter. They argue that that the state should be neutral in matters of morality, much as it is constitutionally required to be with respect to religion. Others, stressing the practical aspect of the problem, invoke the aphorism “you can’t legislate morality.” Over the last several decades, arguments over law and morality have focused on criminal prohibitions of consensual sexual con- duct. Offenses such as adultery, fornication, and sodomy, which were inherited from the English common law, have become obsolete in modern America. Some legisla- tures abolished these offenses when they modernized their criminal codes. In other instances, courts have declared unconstitutional the laws defining these crimes. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (in- validating laws proscribing sodomy between consenting adults). However, students must realize that the moral basis of the law extends far beyond ancient prohibitions of sexual conduct. Many proscriptions of the criminal law, from animal cruelty to insider stock trading, are based on collective societal judgments about what is right and what is wrong.

In order to maintain its legitimacy, the criminal law must reflect the prevail- ing morality of the people. In a democratic society, laws that do not reflect broadly shared values will be challenged and eventually likely be changed. Of course, there is considerable inertia in the law, and someone has to lead the effort for change. Some- times interest groups lead the way by lobbying elected officials and even filing law- suits in the courts. In some instances, such as the civil rights movement of the 1950s and 60s, grassroots social movements brought about profound changes in the law. And in extreme situations, courageous people have resorted to **civil disobedience** in order to dramatize the injustice of a particular law.

Such was the case when Dr. Martin Luther King, Jr. went to jail in Birmingham, Alabama rather than abide by racial segregation laws that he and many others deemed to be unjust. Today, students reading about the defunct Jim Crow laws in history books may find it hard to understand that such laws once were supported by political majorities in many states and communities. Ultimately, after many years of struggle, most Americans came to believe that the laws requiring racial segrega- tion were unjust and needed to be done away with, which was a concept reflected in the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483,

74 S.Ct. 686, 98 L.Ed.873 (1954). The idea that the law should not discriminate among people based on their race is a moral principle that has now become firmly established in our legal system. That is not to say that there is no racial discrimination in the criminal justice system. But the well-established principle of “equal protection of the laws” provides a moral and constitutional basis upon which to challenge any such discrimination.

Crime: An Injury against Society

As suggested by the previous discussion of societal interests served by the criminal law, our legal system regards crimes not merely as wrongs against particular victims but as offenses against the entire society. Indeed, there does not have to be an in- dividual victim in order for there to be a crime. For example, it is a crime to pos- sess cocaine, even though it is unlikely that a particular individual will claim to have been victimized by another person’s use of the drug. This is a crime because society,

through its governing institutions, has made a collective judgment that cocaine use is inimical to the public welfare. Similarly, certain consensual sexual acts (for example, incest) remain crimes in many jurisdictions because communities continue to regard such actions as contrary to public decency. Of course, as society evolves and its stan- dards change, behaviors that were once defined as crimes (for example, blasphemy) are no longer subject to criminal sanction. Over time, the particular prohibitions of the criminal law more or less reflect an evolving social consensus about both what is right and wrong and what is public and private. When a particular criminal prohibi- tion (for example, adultery) is no longer supported by societal consensus, it is apt to be unenforced or be stricken from the laws.

Because crime is an injury against society, the government, as society’s legal representative, brings charges against persons accused of committing crimes. In the United States, we have a federal system—that is, a division of power and re- sponsibility between the national and state governments. Both the national gov- ernment and the states enact their own criminal laws. Thus, both the national government and the state governments may prosecute persons accused of crimes. The national government initiates a prosecution when a federal (national) law has been violated; a state brings charges against someone who is believed to have violated one of its laws.

Criminal Responsibility

The criminal law—indeed, our entire legal system—rests on the idea that individuals are responsible for their actions and must be held accountable for them. This is the essential justification and rationale for imposing punishments on persons convicted of crimes. On the other hand, society recognizes that certain individuals (for example, young children) lack the capacity to appreciate the wrongfulness of their conduct. Similarly, factors beyond individuals’ control can lead them to commit criminal acts. In such instances the law exempts individuals from responsibility. Moreover, there are situations in which acts that would otherwise be crimes might be justified. The best example of this is committing a homicide in self-defense. Individuals can invoke a host of defenses beyond a simple denial of guilt. Indeed, a substantial body of law is devoted to the topic of criminal responsibility and defenses. We examine this topic in some detail in Chapter 14.

The Role of the Crime Victim

Because the government prosecutes criminals on behalf of society, the **victim** of a crime is not a party to the criminal prosecution. By filing a complaint with a law enforcement agency, a victim initiates the process that leads to prosecution, but once the prosecution begins, the victim’s participation is primarily that of being a witness. Quite often, victims feel lost in the shuffle of the criminal pro- cess. They sometimes feel that the system is insensitive or even hostile to their interests in seeing justice done. Some states are now taking steps to address victims’ concerns. Despite some measures being proposed and others that have been adopted, crime victims remain secondary players in the criminal justice system. The principal parties in a criminal case are the prosecution (that is, the government) and the defendant (that is, the accused person). In some situations, however, the victim might have another remedy: a civil suit to recover damages for losses or injuries suffered.

Criminal Law Distinguished from Civil Law

The criminal law is not the only body of law that regulates the conduct of persons. The civil law provides remedies for essentially private wrongs, offenses in which the state has a less direct interest. Most civil wrongs are classified as either **breaches of contract** or **torts**. A breach of contract occurs when a party to a contract violates the terms of the agreement. A tort, on the other hand, is a wrongful act that does not violate any enforceable agreement but nevertheless violates a legal right of the injured party. Common examples of torts include wrongful death, intentional or negligent infliction of personal injury, wrongful destruction of property, trespass, and defamation of character. A crime normally entails intentional conduct; thus, a driver whose car accidentally hits and kills another person would not necessarily be guilty of a crime, depending on the circumstances (see discussions of manslaughter and vehicular homicide in Chapter 6). If the accident resulted from the driver’s negligence, the driver would have committed the tort of wrongful death and would be subject to a civil suit for damages.

The criminal law and the civil law often overlap. Conduct that constitutes a crime can also involve a tort. For example, suppose Randy Wrecker intentionally dam- ages a house belonging to Harvey Homeowner. Wrecker’s act might well result in both criminal and civil actions being brought against him. Wrecker may be prose- cuted by the state for the crime of willful destruction of property and may also be sued by Homeowner for the tort of wrongful destruction of property. The state would be seeking to punish Wrecker for his antisocial conduct, whereas Homeowner would be seeking compensation for the damage to his property. The criminal case would be designated *State v. Wrecker (or People v. Wrecker, or even Common- wealth v. Wrecker*, depending on the state); the civil suit would be styled *Homeowner v. Wrecker.*

| Origins and Sources of the Criminal Law

Many antisocial acts classified as crimes have their origin in the norms of primitive societies. Humanity has universally condemned certain types of behavior since an- cient times. Acts such as murder, rape, robbery, and arson are considered ***mala in se***,



The O. J. Simpson Murder and Wrongful Death Cases

**CASE-IN-POINT**

In what many in the media called the “trial of the cen- tury,” former football and movie star O. J. Simpson

and awarded the plaintiffs $8.5 million in damages. The Simpson case illustrates dramatically how a defen- dant can be accused of a crime and a tort based on the same alleged act.

was accused of murdering his ex-wife, Nicole Brown Simpson, and her companion, Ron Goldman. The trial began on January 24, 1995. On October 3, 1995, the jury delivered a stunning verdict, declaring Simpson not guilty of murder. A year later the families of the decedents initiated a civil suit against Simpson, alleg- ing the tort of wrongful death. On February 4, 1997, a different jury found Simpson liable for the wrong- ful death of Nicole Brown Simpson and Ron Goldman

Many observers have wondered how the two cases could have come out differently. One answer is that they were independent legal actions resulting in sepa- rate trials before entirely different juries. Moreover, the standards of proof were different. In the criminal trial, the jury had to find Simpson guilty of murder be- yond a reasonable doubt. In the civil case, the standard of proof was less demanding: the jury had only to find Simpson liable by a preponderance of the evidence.

or inherent wrongs. Other acts that the modern criminal law regards as offenses are merely ***mala prohibita***; they are offenses only because they are so defined by the law. Many so-called victimless crimes, such as gambling or possession of marijuana, are generally not regarded as offensive to universal principles of morality. Rather, they are wrong simply because the law declares them wrong. In the case of *mala prohibita* of- fenses, society has made a collective judgment that certain conduct, although not con- trary to universal moral principles, is nevertheless incompatible with the public good.

Development of Law in the Western World

The general consensus is that law developed in Western civilization as leaders began formalizing and enforcing customs that had evolved among their peoples. Eventu- ally, informal norms and customs came to be formalized as codes of law. The Code of Hammurabi regulated conduct in ancient Babylonia some two thousand years before Christ. In the seventh century b.c., Draco developed a strict code of laws for the Athenian city-states. Even today, one hears strict rules or penalties characterized as being “Draconian.” These laws influenced the Romans in their development of the Twelve Tables in the fifth century b.c. And, of course, long before the time of Jesus, the Hebrews had developed elaborate substantive and procedural laws.

In the sixth century a.d., the Emperor Justinian presided over a codification of the Roman law that would prove to be very influential in the evolution of law on the European continent. The Napoleonic Code, promulgated under Napoleon Bonaparte in 1804 as a codification of all the civil and criminal laws of France, was based largely on the Code of Justinian. The Napoleonic Code became a model for a uniform system of law for Western European nations. This is why the legal systems of Western Europe are often said to be “Roman law” systems. Roman law systems are based on the primacy of statutes enacted by the legislature. These statutes are integrated into a comprehensive code designed to be applied by the courts with a minimum of judicial interpretation.

Development of the English Common Law

American criminal law is derived largely from the **English common law**, which dates from the eleventh century. Before the Norman Conquest of 1066, English law was a patchwork of laws and customs applied by local courts. The new Norman kings ap- pointed royal judges to settle disputes based on the customs of the people. By 1300, the decisions of the royal judges were being recorded to serve as precedents to guide judges in future similar cases. Eventually a common body of law emerged throughout the entire kingdom, hence the term “*common law*.” As the centuries passed, coher- ent principles of law and definitions of crimes emerged from the judges’ decisions. Thus, in contrast with Roman law systems, which are based on legal codes, the com- mon law developed primarily through judicial decisions. The common-law doctrine of following precedent, known as ***stare decisis****,* remains an important component of both the English and American legal systems today.

By 1600, the common-law judges had defined as felonies the crimes of murder, manslaughter, mayhem, robbery, burglary, arson, larceny, rape, suicide, and sodomy. They had also begun to define a number of lesser offenses as misdemeanors. In con- trast with the criminal law that was developing on the continent, England developed trial by jury and trained barristers to argue cases on an adversarial basis. A barrister is a lawyer permitted to cross the “bar” in the courtroom that separates the bench from

the spectators. Thus, in England, a barrister is a trial lawyer. Although we do not use the term “barrister” in the United States, we do refer to licensed attorneys as having been “admitted to the bar.”

As representative government emerged in England in the seventeenth century, the dominance of the common-law courts diminished. Parliament came to play a sig- nificant role in the formation of the criminal law by adopting **statutes** that revised and supplemented the common law. The adversarial system of justice continued, however, and the basic English felonies remain today defined essentially as they were by the common-law judges centuries ago.

Reception of the Common Law in America

Our criminal laws are rooted in the common law as it existed when America pro- claimed its independence from England in 1776. After independence, the new American states adopted the English common law to the extent that it did not con- flict with the new state and federal constitutions. However, the federal government did not adopt the common law of crimes. From the outset, statutes passed by Congress defined federal crimes. Of the fifty states, Louisiana is the only one whose legal system is not based on the common law. Rather, it is based primarily on the Napoleonic Code.

The new American judges and lawyers were greatly aided by Blackstone’s *Com- mentaries on the Laws of England,* published in 1769, in which Sir William Black- stone, a professor at Oxford, codified the principles of the common law. Blackstone’s seminal effort was a noble undertaking, but it demystified English law. Consequently, Blackstone’s encyclopedic treatment of the law was less than popular among English barristers, who by this time had developed a close fraternity and took great pride in offering their services to “discover the law.” In America, however, **Blackstone’s *Commentaries*** became something of a “legal bible.”

State and Local Authority to Enact

Criminal Prohibitions

At the time of the American Revolution, the English common law constituted the criminal law of the new United States. As new states entered the Union, their legis- latures usually enacted “reception statutes,” adopting the common law to the extent that it did not conflict with the federal or their respective state constitutions. Eventu- ally, most common-law definitions of crimes were superseded by legislatively defined offenses in the form of statutes adopted by the state legislatures. Today, the state legislatures are the principal actors in defining crimes and punishments. Persons who violate state criminal statutes are prosecuted in the state courts (see Chapter 2).

For the most part, modern state statutes retain the *mala in se* offenses defined by the common law, but many of the old common-law crime definitions have been modified to account for social and economic changes. For example, the offense of rape originated under English common law, but the offense is defined much differ- ently under modern state statutes. Today, under most state laws, the offender and victim may be of either sex, and the offense encompasses anal and oral as well as vaginal penetrations by a sex organ or by another object. Indeed, the broader mod- ern offense of sexual battery embraces all types of nonconsensual sexual impositions (see Chapter 7). As we shall see in subsequent chapters, modern criminal statutes often go far beyond the common law in prohibiting offenses that are *mala prohibita*.

Drug and alcohol offenses, environmental crimes, offenses against public health, and traffic violations fall into this category.

When authorized by state constitutions or acts of state legislatures, cities and counties may adopt **ordinances** that define certain criminal violations. Local ordi- nances typically deal with traffic offenses, animal control, land use, building codes, licensing of businesses, and so forth. Usually these offenses are prosecuted in courts of limited jurisdiction, such as municipal or county courts (see Chapter 2).

Federal Authority to Define Crimes

As we have seen, the common law of crimes was more or less adopted by the various state legislatures. The U.S. Congress never adopted the common law, as there was no need for it to do so. The national government’s responsibility in the criminal justice area has always been more limited than that of the states. Unlike the state legisla- tures, Congress does not possess **police power**, which is the broad authority to enact prohibitions to protect public order, safety, decency, and welfare. Yet Congress does possess authority to enact criminal statutes that relate to Congress’s particular legisla- tive powers and responsibilities. Thus, there are federal criminal laws that relate to military service, immigration and naturalization, use of the mail, civil rights, and so forth. In particular, Congress has used its broad power to regulate interstate com- merce to criminalize a wide range of offenses, including carjacking, loan sharking, kidnapping, illicit drug dealing, wire fraud, and a variety of environmental crimes (see Chapter 3). Of course, persons who commit federal crimes are subject to pros- ecution in the federal courts.



**SUPREME COURT PERSPECTIVE**

*United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740,

146 LEd.2d 658 (2000)

In this case, which stemmed

from an alleged rape by football players at Virginia

Tech University, the Supreme Court declared uncon- stitutional a federal statute that provided a federal civil remedy to victims of “gender-motivated violence.” The Court found that the law exceeded Congress’s author- ity to enact legislation regulating interstate commerce. The Court’s decision in *Morrison* reinforced the tra- ditional notion that congressional authority to enact criminal law is much more limited than that of the states.

CHIEF JUSTICE [WILLIAM] REHNQUIST Delivered the Opinion of the Court, Saying in Part:

*Under our written Constitution . . . the limitation of congressional authority is not solely a matter of*

*legislative grace. . . . We accordingly reject the ar-*

*gument that Congress may regulate noneconomic, violent criminal conduct based solely on that con- duct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . . In recog- nizing this fact we preserve one of the few princi- ples that have been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the in- strumentalities, channels, or goods involved in inter- state commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindica- tion of its victims.*

The Model Penal Code

The American Law Institute (ALI) is an organization of distinguished judges, lawyers, and academics that have a strong professional interest in drafting model codes of laws. In 1962, after a decade of work that produced several tentative drafts, the ALI published its Proposed Official Draft of the **Model Penal Code** (MPC). The MPC consists of general provisions concerning criminal liability, definitions of specific crimes, defenses, and sentences. The MPC is not law; rather, it is designed as a model code of criminal law for all states. It has had a significant impact on legis- lative drafting of criminal statutes, particularly during the 1970s, when the majority of states accomplished substantial reforms in their criminal codes. In addition, the MPC has been influential in judicial interpretation of criminal statutes and doctrines, thereby making a contribution to the continuing development of the decisional law. In this text, we illustrate many principles of law by selected statutes from federal and state jurisdictions; however, in some instances where the MPC is particularly influen- tial, the reader will find references to specific provisions of the MPC.

Sources of Procedural Law

As we noted earlier, the criminal law has both substantive and procedural dimen- sions. The procedural criminal law is defined by legislative bodies through enactment of statutes and is promulgated by the courts through judicial decisions and the de- velopment of rules of court procedure. The U.S. Supreme Court prescribes **rules of procedure** for the federal courts. Generally, the highest court of each state, usually called the state supreme court, is empowered to promulgate rules of procedure for all the courts of that state.

| Constitutional Limitations

Substantive and procedural criminal laws are subject to limitations contained in the federal and state constitutions. For example, the U.S. Constitution defines the crime of **treason** in Article III, Section 3. In enacting the federal statute prohibiting treason against the United States, Congress must follow this constitutional definition. The Con- stitution (Article I, Sections 9 and 10) also prohibits Congress and the state legislatures from enacting ***ex post facto* laws** and **bills of attainder**. The prohibition of *ex post facto* laws means that an act cannot be made a crime retroactively. To be criminal, an act must be illegal at the time it was committed. A bill of attainder is a legislative act declaring someone guilty of a crime. Only courts of law can convict people of criminal wrongdoing. (See Chapter 3 for more discussion of treason, *ex post facto* laws, and bills of attainder).

Go to the companion website for an edited version of the Supreme Court’s decision in *Brandenburg v. Ohio.*

The Bill of Rights

Many of the most important constitutional provisions relative to criminal justice are found in the **Bill of Rights** (the first ten amendments to the Constitution adopted by Congress in 1789 and ratified by the states in 1791). Among other things, the First Amendment to the U.S. Constitution prohibits government from using the civil or criminal law to abridge freedom of speech. The courts have said, for example, that people cannot be prosecuted merely for advocating violence; there must be “immi- nent lawless action” to justify a criminal sanction on public expression. *Brandenburg v. Ohio,* 395 U.S. 444; 89 S.Ct. 1827; 23 L.Ed.2d 430 (1969).

Go to the companion website for an edited version of *Duncan v. Louisiana.*

In addition to limitations on the enactment of criminal laws, the Bill of Rights has much to say about the enforcement of these laws. These provisions, which con- stitute much of the basis of criminal procedure, include the Fourth Amendment prohibition of unreasonable searches and seizures, the Fifth Amendment injunction against compulsory self-incrimination, and the Sixth Amendment right to trial by jury. Finally, the Eighth Amendment prohibition of “cruel and unusual punishments” protects citizens against criminal penalties that are barbaric or excessive.

Virtually all the provisions of the Bill of Rights have been held to apply with equal force to the states and to the national government. *Duncan v. Louisiana,*

391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Thus, the Bill of Rights limits the adoption of criminal laws whether by Congress, the state legislatures, or the myriad city and county legislative bodies. The Bill of Rights also limits the actions of police, prosecutors, judges, and corrections officers at the local, state, and national levels.

State legislatures, courts, and law enforcement agencies must also be aware of the limitations contained in their own state constitutions. Although state consti- tutional provisions are subordinate to provisions of the federal constitution, state constitutions often go beyond the federal constitution in protecting citizens from governmental authorities. For example, in the area of search and seizure, a number of state courts have interpreted their respective state constitutions more stringently than the federal courts have interpreted the Fourth Amendment (see Chapter 15).

| The Role of Courts in Developing the Criminal Law Courts of law play a crucial role in the development of both the substantive and the procedural criminal law. **Trial courts** exist primarily to make factual determinations, apply settled law to established facts, and impose sanctions. In so doing, trial courts are bound, as are all courts of law, by relevant constitutional provisions and principles. In reviewing the decisions of trial courts, **appellate courts** must interpret the federal and state constitutions and statutes, which are replete with majestic phrases such as “equal protection of the laws” and “privileges and immunities” that require interpretation. That is, courts must define exactly what these grand phrases mean within the context of particular legal disputes. Likewise, federal and state statutes often use vague lan- guage like “affecting commerce” or “reasonable likelihood.” Courts must assign mean- ing to these and a multitude of other terms. Although most states have abolished all, or nearly all, common-law crimes and replaced them with statutorily-defined offenses, the common law remains a valuable source of statutory interpretation because legislatures frequently use terms known to the common law without defining such terms. For ex- ample, in proscribing burglary, the legislature might use the term “curtilage” without defining it. In such an instance, a court would look to the common law, which defined the term to mean “an enclosed space surrounding a dwelling.”

In rendering interpretations of the law, appellate courts generally follow prec- edent, in keeping with the common-law doctrine of *stare decisis.* In our rapidly changing society, however, courts often encounter situations to which precedent ar- guably does not or should not apply. In such situations, courts will sometimes deviate from or even overturn precedent. Moreover, there are situations in which there is no applicable precedent. When this occurs, the appellate courts will have the oppor- tunity to “make new law.” Thus, appellate courts perform an important **lawmaking function** as well as an **error correction function**. Therefore, any serious student of criminal law must follow developments in the **decisional law**—that is, law as devel- oped by courts in deciding cases.

Legal Reasoning in Judicial Decisions

The English common-law judges originally arrived at decisions by applying commu- nity norms—the common customs of the English people. They then judged subse- quent cases by analogizing issues to their previous decisions. In the United States we have written federal and state constitutions, but the process of reasoning by anal- ogy continues, albeit on a more sophisticated basis. Students are prone to look upon these basic instruments of legal policy as a body of established rules that are applied by judges to determined facts. But the framers of our federal and state constitutions painted with a broad brush, leaving the courts to mold such concepts as “due pro- cess of law” to a dynamic society. Moreover, legislative rules are usually drafted with particular situations in mind and frequently are unclear when applied to situations the lawmakers did not contemplate or could not have contemplated. Legal reasoning develops rules to resolve ambiguities based on the presumed intent of the legislators, where necessary, “to fill in gaps,” always subject to constitutional mandates. Thus, the use of analogy becomes an indispensable tool as lawyers and judges look for similari- ties to previously adjudicated cases. Finally, although reasoning by analogy preserves the experience of the past, increasingly it also requires a consideration of contempo- rary social, cultural, and economic norms when considering the importance given to the facts that resulted in decisions in analogous cases.

References to Statutes and Judicial Decisions

Throughout this text the reader will find references to federal and state statutes and decisions of federal and state courts. Appendix A, “Access to the Law through Legal Research,” explains how to find the law in statutes, court decisions, and other publica- tions. But at this point we simply mention that statutes enacted by Congress are usually cited to the *United States Code Annotated* (U.S.C.A.) published by the West Group, while state criminal codes are cited to books published by state or commercial publishers. For example, a citation to 18 U.S.C.A. § 2101(a) defines “riot;” a citation to Ariz. Rev. Stat.

§ 13-2002 refers to a section of the Arizona Criminal Code that defines forgery. Court decisions cited in the text are almost always decisions of federal or state appellate courts. For example, *Brandenburg v. Ohio* indicates the name of the defendant petitioning for review and the state that prosecuted the defendant. Data under the name of the case indicates the name of the court and date of its decision, followed by numbers indicat- ing the volume and page number of the Reporter, a compendium of judicial decisions, where the decision is found. To illustrate, in *Brandenburg v. Ohio*, the decision was made in 1969 by the U.S. Supreme Court and is found in 95 U.S. 444, 89 S.Ct. 1827,

23 L.Ed.2d 430 (1969). The “U.S.” citation refers to the volume and page number of an official set of reports; the remainder of the citation referes to commercial publications, the Supreme Court Reporter (S.Ct.) and Lawyers Edition (L.Ed.2d). *Whitner v. State*,

492 S.E.2d 777 (S.C. 1997) illustrates a state court decision—in this instance a 1997 de- cision of the Supreme Court of South Carolina found on page 777 of volume 492 of the second series of Reporters for the region encompassing South Carolina.

| The Criminal Process

By far the broadest and most important constitutional principle relating to criminal justice is found in the Due Process Clauses of the Fifth and Fourteenth Amend- ments to the Constitution. The same principle can be found in similar provisions of

**SIDEBAR**

“Briefing Cases”

As noted earlier in the chapter, edited cases relevant to this book have been placed on a companion web- site. Reading these decisions can be useful to anyone seeking to understand the criminal law, and instructors may also ask their students to “brief ” some or all of these cases. A case brief is simply a summary of a court decision, usually in outline format. Typically, a case brief contains the following elements:

• The name of the case and the date of the decision

• The essential facts of the case

• The key issue(s) of law involved (or those applica- ble to a point of law being considered)

• The holding of the court

• A brief summary of the court’s opinion, especially as it relates to key issue(s) in the case

• Summaries of concurring and dissenting opinions, if any

• A statement commenting on the significance of the decision.

Here is a sample case brief:

Brandenburg V. Ohio

u.s. supreme court

*95 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)*

FACTS: Brandenburg, a member of the Ku Klux Klan, was convicted under Ohio law of “advocate[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means

of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” He was fined

$1,000 and sentenced to 1–10 years in prison. His ap- peal was dismissed by the Ohio Supreme Court and the U.S. Supreme Court granted review.

ISSUE: Does the First Amendment to the U.S. Consti- tution permit a state to criminalize the mere advocacy of violence?

DECISION: Conviction overturned; Ohio statute de- clared unconstitutional.

OPINIONS: Majority Opinion (Per Curiam): The Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law vio- lation except where such advocacy is directed to incit- ing or producing imminent lawless action and is likely to incite or produce such action.”

COMMENT: The Court narrowed the long-standing “clear and present danger” test to limit it to instances of expression involving “imminent lawless action.” While recognizing the protections of the First Amendment are not absolute, the Supreme Court in this decision afforded broad constitutional protection to speech, even that which is hateful, bigoted, or re- garded by many in the community as dangerous.

every state constitution. Reflecting a legacy that can be traced to the Magna Carta (1215), such provisions forbid the government from taking a person’s life, liberty, or property, whether as punishment for a crime or any other reason, without **due process of law**. Due process refers to those procedural safeguards necessary to en- sure the fundamental fairness of a legal proceeding. Most fundamentally, due process requires **fair notice** and a **fair hearing**. That is, persons accused of crimes must have ample opportunity to learn of the charges and evidence being brought against them as well as the opportunity to contest those charges and that evidence in open court.



One of the most basic tenets of due process in criminal cases is the **presumption of innocence**. Unless the defendant pleads guilty, the prosecution must establish the defendant’s guilt by evidence produced in court. Everyone accused of a nonpetty offense has the right to a trial by jury (although, we shall see, trials are actually con- ducted in only a small minority of cases). In a criminal trial, the standard of proof is “beyond a reasonable doubt.” The **reasonable doubt standard** differs mark- edly from the “preponderance of evidence” standard that applies to civil cases. In a civil trial, the judge or jury must find only that the weight of the evidence favors the

plaintiff or the defendant. In a criminal case, the fact finder must achieve the “moral certainty” that arises from eliminating “reasonable doubt” as to the defendant’s guilt. Of course, it is difficult to define with precision the term “reasonable.” Ultimately, this is a judgment call left to the individual judge or juror.

Basic Procedural Steps

Certain basic procedural steps are common to all criminal prosecutions, although specific procedures vary greatly among jurisdictions. (Figure 1.2 illustrates the major components of the criminal process.) In every jurisdiction law enforcement agencies make arrests, interrogate persons in custody, and conduct searches and seizures. All of these functions are regulated by the procedural law. In every jurisdiction there are procedures through which persons accused of crimes are formally notified of the charges against them and given an opportunity to answer these charges in court. There is a formal charging process which, depending on the jurisdiction, involves an **indictment** by a **grand jury** or an **information** filed by a prosecutor. In every jurisdiction there is a procedure known as an **arraignment**, in which the defendant enters a plea of guilty or not guilty, or in some instances a plea of *nolo contendere* (no contest). Only a plea of not guilty necessitates a **criminal trial**. The trial is the crown jewel of criminal procedure—an elaborate, highly formal process for determining guilt or innocence and imposing punishment on those found guilty. The criminal trial is a highly formal process, governed by **rules of procedure** and **rules of evidence** (see Chapter 18).

The decisions of trial courts, both with respect to pretrial matters and the con- duct of criminal trials, are subject to review by appellate courts (see Chapter 20). All court procedures, from the initial appearance of an accused before a magistrate to the decision of an appellate court upholding a criminal conviction and/or sentence, are governed by an elaborate framework of laws, rules, and judicial decisions.

The Sieve Effect

As cases move through the criminal justice system from arrest through adjudication and, in many instances, toward the imposition of punishment, there is considerable attrition. Of any one hundred felony arrests, perhaps as few as twenty-five will result in convictions. This “sieve effect” occurs for many reasons, including insufficient evi- dence, police misconduct, procedural errors, and the transfer of young offenders to juvenile courts.

Nationwide, less than five percent of criminal cases go to trial. Some cases are dropped by the prosecutor for lack of evidence or because of obvious police miscon- duct. Others are dismissed by judges at preliminary hearings, usually for similar rea- sons. In those cases that are not dismissed, defendants usually enter pleas of guilty, very frequently in exchange for concessions from the prosecution. To avoid trial, which is characterized by both delay and uncertainty, the prosecutor may attempt to persuade the defendant to plead guilty, either by reducing the number or severity of charges or by promising not to seek the maximum penalty allowed by law.

The U.S. Supreme Court has upheld the practice of **plea bargaining** against claims that it violates the Due Process Clauses of the Fifth and Fourteenth Amend- ments. *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). However, because there is always a danger of coerced guilty pleas, especially when defendants

**Investigation**

Out of system

*Guilty Plea*

**Search and Seizure** (Ch. 15)

**Arrest**

(Ch. 16)

**Formal Charging Process** (Ch. 17)

**Arraignment**

(Ch. 17)

*Not Guilty Plea*

**Trial**

(Ch. 18)

*Conviction*

*Acquittal*

**Sentencing**

(Ch. 19)

**Appeals Process** (Ch. 20)

**Punishment**

(Ch. 19)

Out of system

Out of system

Out of system

Out of system

Out of system

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**FIGURE 1.2** The criminal process.

Go to the companion website for an edited version of *Boykin v. Alabama.*

are ignorant of the law, it is the judge’s responsibility to ascertain whether the defendant’s guilty plea is voluntarily and knowingly entered and that there is some factual basis for the offense charged. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709,

23 L.Ed.2d 274 (1969).

| Criminal Sanctions

Courts have at their disposal a variety of sanctions to impose on persons convicted of crimes. During the colonial period of American history, and indeed well into the nineteenth century, the **death penalty** was often inflicted for a variety of felonies, including rape, arson, and horse theft. Today, the death penalty is reserved for only the most aggravated forms of murder and is infrequently carried out. **Incarceration** is the conventional mode of punishment prescribed for persons convicted of felonies, while **monetary fines** are by far the most common punishment for those convicted of misdemeanors. For first-time offenders, especially those convicted of nonviolent crimes, **probation** is a common alternative to incarceration, although probation usu- ally entails a number of restrictions on the offender’s freedom.

As society becomes more cognizant of the rights of crime victims, courts are increasingly likely to require that persons convicted of crimes pay sums of money to their victims by way of **restitution**. Requiring offenders to make restitution and per- form community service are common conditions of release on probation. Community service is often imposed as a condition as part of a **pretrial diversion program** in which first-time nonviolent offenders are offered the opportunity to avoid prosecu- tion by completing a program of counseling or service. Increasingly, courts are re- quiring drug offenders to undergo **treatment programs** as conditions of probation.

**Conclusion**

The American system of criminal justice is deeply rooted in the English common law, but the specifics of criminal law and procedure have evolved substantially from their medieval English origins. Today, American criminal law is largely codified in statutes adopted by Congress and the state legislatures, as interpreted by the courts in specific cases.

One of the more tragic aspects of the crime problem is that many Americans are losing faith in the ability of their government to protect them from criminals. Indeed, in some areas of the country, victims are unlikely even to report crimes to the police. Some victims are unwilling to endure the ordeal of being a witness. Others simply believe that the perpetrator will not be apprehended or, if so, will not be punished. It also must be recognized that there is deep distrust of the police in many of the nation’s inner cities. In certain communities cooperation with the police can even be dangerous, as criminal gangs will often retaliate against those who cooperate with the authorities.

Our state and federal governments are severely constrained both by law and eco- nomic reality in their efforts to fight crime. Not only is the specter of “a cop on every corner” distasteful to most Americans, it is also impossible to achieve given the cost. Local governments often find it very difficult to provide adequate support to their law enforcement agencies.

Though the nation’s prison system is filled beyond capacity, the public is de- manding that more convicted criminals be incarcerated and for longer periods of time. Yet the public appears unwilling to provide the revenues needed to build the

additional prisons necessary to house these inmates. Increasingly courts are turning to alternatives to incarceration, especially for first-time and nonviolent offenders.

Finally, society must confront the problem of the constitutional limitations on crime definition and law enforcement. Judges do have considerable discretion in interpreting the state and federal constitutions. But if these documents are to be viable protections of our cherished liberties, we must accept that they place signifi- cant constraints on our efforts to control crime. For instance, to what degree is the public willing to allow erosion of the constitutional protection against unreasonable searches and seizures? To what degree are we willing to sacrifice our constitutionally protected privacy and liberty to aid the ferreting out of crime? Today the question is amplified by the threat of terrorism and the belief of many that government needs greater powers to address the terrorist threat. These are the fundamental ques- tions of criminal law and procedure in a society that prides itself on preserving the rights of the individual.

**Chapter Summary**

This chapter introduces the reader to the basic structure of the criminal justice sys- tem in the United States. It explains how the system allocates powers to the executive, legislative, and judicial branches of government. It also defines the basic nomencla- ture of the system—a system grounded in the U.S. Constitution and Bill of Rights and similar state documents and based on constitutional supremacy, separation of powers, and federalism.

Crimes are of a different order from other wrongs and social controls. Civil dis- putes often are formally resolved in litigation between the disputants; crimes can result in punishment by the state. Therefore the criminal law must reflect the prevailing mo- rality of the people, and as we shall see in later chapters, laws that fail to reflect broadly shared values will be challenged and eventually likely be changed. It is helpful to review the societal interests protected by the crimes identified in this chapter.

We introduce many terms that will be used throughout the book and will be- come a part of the reader’s criminal justice lexicon. Elements of crimes include an act (*actus reus*) and intent (*mens rea*), yet certain offenses are strict liability crimes. Some conduct have been historically classified as *mala in se* or *mala prohibitum,* giving rise to classification of felonies and misdemeanors based on the seriousness of offenses.

We inherited our legal system from the English common law, where judges be- gan to record their decisions and adjudicate controversies based on rules developed in analogous situations. This led to development of the doctrine of *stare decisis,* largely followed by American courts. Later, as English Parliaments began defining crimes, the newly instituted American legislative bodies also defined criminal conduct largely based on the English common law. In 1769 Professor Blackstone attempted to codify the law in his famous treatise; today a proposed Model Penal Code (MPC) advocates uniformity in crime definitions.

Before a person can be adjudicated guilty of a crime the authorities prosecuting a defendant must follow strict guidelines set out in the federal and state constitutions and the substantive and procedural law. As you proceed in this book you will gain a new appreciation of such constitutional mandates as “due process of law” and “equal protection of the law,” which are implemented by “presumption of innocence,” “fair notice,” and “fair hearing.” There is a certain “sieve effect” in the criminal justice system. This occurs because of guilty pleas, often resulting from plea bargains, and prosecutorial judgments not to prosecute. These processes strain out cases that do not merit prosecution.

This chapter discusses judicial review and introduces the role of the grand jury and such terms as “indictment,” “information,” “arraignment,” the constitutional def- inition of “treason,” and constitutional concepts that prohibit *ex post facto* laws and bills of attainder. And we introduce rules of evidence and rules of procedure and the requirement for “proof beyond a reasonable doubt.”

We tracked the criminal justice process from arrest until adjudication, sentence and in some instances an appeal, and the basic functions of trial and appellate courts. The reader’s acquaintanceship with such common terms as the death penalty, fines, incarceration, and probation was renewed and augmented with terms such as “restitution” and “pretrial diversionary program.” Finally, the reader should find it helpful at this early stage to become familiar with statutory and case citations and to learn how to “brief ” a case.

**Key Terms** *actus reus* appellate courts arraignment

Bill of Rights bills of attainder Blackstone’s *Commentaries* breaches of contract

civil disobedience constitutional supremacy criminal trial

death penalty decisional law

due process of law English common law error correction function *ex post facto* laws

fair hearing fair notice federalism felonies grand jury

incarceration indictment information judicial review

lawmaking function

*mala in se*

*mala prohibita*

*mens rea* misdemeanors Model Penal Code monetary fines

*nullen crimen, nulla poena, sine lege*

ordinances

plea bargaining police power

presumption of innocence pretrial diversion program probation

procedural criminal law reasonable doubt standard restitution

rule of law

rules of evidence rules of procedure separation of powers *stare decisis*

statutes

strict liability offenses substantive criminal law torts

treason

treatment programs trial courts

victim

**Questions for Thought and Discussion**

1. Should morality, in and of itself, be considered a sufficient basis for defining particular conduct as criminal? Give reasons to support your view.

2. What are the chief distinctions between the civil and criminal law? Why do the criminal and civil law sometimes overlap?

3. To what extent is the English common law significant in contemporary American criminal law?

4. What is the essential difference between substantive criminal law and proce- dural criminal law? Can you give examples of each?

5. What means of punishment for criminal offenses exist in your state? Is capital punishment available for persons convicted of first-degree murder? Which pun- ishments, if any, do you think are most effective in controlling crime?